

**Matter of Kelly**

2007 NY Slip Op 33230(U)

September 6, 2007

Surrogate's Court, Nassau County

Docket Number: 0343329/2007

Judge: John B. Riordan

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SURROGATE'S COURT: STATE OF NEW YORK  
COUNTY OF NASSAU

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In the Matter of the Probate of the Last Will and Codicil

of

File No. 343329

PHILOMENA KELLY,

Dec. No. 511

Deceased.

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This is an uncontested proceeding to probate a copy of the last will and testament of the decedent, Philomena Kelly. The will is dated June 26, 2002, the original of which cannot be located. The petitioner is the nominated alternate executor, Colleen Ann Hothan, the decedent's daughter. The nominated executor, the decedent's husband, has filed a renunciation of his right to serve as executor. A waiver and consent has been filed by the decedent's son, William John Kelly, the decedent's only other distributee, who was expressly disinherited both by the will offered for probate and by the revocable lifetime trust which is the residuary beneficiary under the will.

In order to have a copy of the will admitted to probate, petitioner must satisfy the requirements of SCPA 1407 which provides:

A lost or destroyed will may be admitted to probate only if:

1. It is established that the will has not been revoked, and
2. Execution of the will is proved in the manner required for the probate of an existing will, and
3. All of the provisions of the will are clearly and distinctly proved by each of at least two credible witnesses or by a copy or draft of the will proved to be true and complete.

Considering first the requirement that the execution of the will be proved in the manner

required for probate of an existing will, the court is satisfied that petitioner has established that the will was executed in compliance with ETPL 3-2.1. The execution of the original instrument was supervised by an attorney permitting the inference that the statutory requirements were met (*Matter of Spinello*, 291 AD2d 406 [2d Dept. 2002]). The court is satisfied that the execution was in compliance with the statutory formalities.

All of the provisions of the will were clearly and distinctly proved by the copy of the will offered for probate which was satisfactorily proved to be true and complete by the affidavit of one of the attesting witness who states that the subject document is a true copy of the original will. The other attesting witness, the attorney/draftsman, is deceased.

As to revocation, it is well established that where a will cannot be found after the death of the testator, there is a strong presumption that it was destroyed with the intent to revoke it (*Matter of Evans*, 264 AD2d 482 [2d Dept. 1999]; *Matter of Passuello*, 169 AD2d 1007 [3d Dept. 1991]). Under SCPA 1407 [1], the proponent has the burden to overcome the presumption of revocation by proving that the will was not revoked during the testator's lifetime (*Matter of Fox*, 9 NY2d 400 [1961]). The proponent must demonstrate, by the facts and circumstances, that the will had been destroyed in the testator's lifetime without his knowledge, consent or procurement, or accidentally lost (*Matter of Fox*, 9 NY2d 400 [1961]).

As indicated above, the propounded will leaves the decedent's residuary estate to a lifetime trust for the benefit of decedent's husband and daughter, to the exclusion of her son. Affidavits submitted by the husband and daughter indicate that the decedent and her husband had their respective wills and the joint lifetime trust executed on the same date and all the instruments were thought to have been placed in a large binder and kept by the decedent's

husband in the family home. After the decedent's death, the original will of the decedent could not be located, although the husband's original will was contained in the binder. The affidavit submitted by the decedent's husband indicates that the subject will is the only will ever executed by the decedent, and that in the two years period between the will's execution and the decedent's death no other will or codicil was executed by the decedent. After the decedent's death, the copy of the will was found with the decedent's other important papers, but the original will could not be located.

As indicated above, the decedent's son, who is the person adversely effected by the will's admission to probate, has filed a waiver and consent. Additionally, the fact that a photocopy of an executed will was found in decedent's papers after death presents some evidence of non-revocation (*Matter of Mittelstaedt*, 278 App. Div. 231 [4<sup>th</sup> Dept. 1951]; *Matter of Herbert*, 89 Misc2d 340 [Sur Ct, Nassau County 1977]; *Matter of Papadopoulos*, NYLJ Dec. 14, 2005, at 28, col. 5 [Sur Ct, Kings County]).

Based upon the proof submitted, the court is satisfied that the original will was destroyed or lost accidentally and, therefore, not revoked by decedent during her lifetime (SCPA 1407 [1]). The copy of the will and the original codicil will, therefore, be admitted to probate.

Decree.

Dated: September 6, 2007

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court

